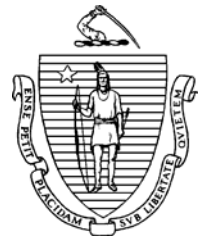


Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-90-16

FACTS:

You are the District Attorney for Suffolk County (DA) and are establishing a pilot program under which members of the private bar would assist your office in handling appeals of convictions. Under the program, each law firm would solicit volunteers from among its attorneys and would put together a list of those who would like to handle a criminal appeal on behalf of the Commonwealth. At intervals, the Appellate Division of the Suffolk County District Attorney's office would call on those firms to provide volunteers to handle appeals that it was unable to handle in-house. Each attorney would be sworn in as a special assistant district attorney without compensation to write the Commonwealth's brief and make the oral argument in a particular case. The appointments would not be for any set length of time, but would last as long as the appeal took, typically between one and three months. The actual time the volunteer will spend on a particular appeal would likely range from a minimum of ten hours to a maximum of sixty or seventy hours in an exceptional case.

You anticipate that no individual attorney from these firms would handle more than two appeals per year. You also anticipate that each firm would undertake for you between five and fifteen appeals each year. You also understand that these firms also provide representation to defendants in unrelated cases prosecuted by your office.

QUESTION:

Does G.L. c. 268A permit attorneys from private law firms to represent your office in appeals from criminal convictions where these firms also represent defendants in unrelated cases prosecuted by your office.

ANSWER:

Yes, subject to the limitations discussed below.

DISCUSSION:

1. Jurisdiction

An attorney who performs services for the DA under the pilot program is considered a "state employee" under G.L. c. 268A, §1(q) during the period in which those services are performed. This jurisdictional status under G.L. c. 268A applies to uncompensated, as well as to compensated service to any state agency. *Id.*

An attorney who performs services to the DA on a voluntary basis is also considered a "special state employee" under G.L. c. 268A, §1(o). A special state employee is exempt from many of the restrictions which G.L. c. 268A imposes on the private outside activities of full-time state employees.

2. Limitations on outside activities of volunteer attorneys

Section 4 of G.L. c. 268A limits certain outside activities of special state employees to the DA, depending on the employees' time commitment to the DA.

(a) Volunteers who serve for 60 days or less in any 365 day period

Under G.L. c. 268A, §4, a special state employee who serves the DA for 60 days or less in any 365 day period is prohibited from acting as attorney for or receiving compensation from any non-state party in connection with any proceeding, controversy or other particular matter^{1/} in which the employee participates^{2/} or has official responsibility for as a special state employee. For example, if a volunteer attorney is assigned by the DA to handle a criminal appeal of a prosecution, the attorney is prohibited by §4 from representing the defendant in connection with the same dispute. On the other hand, §4 does not prohibit the attorney from representing clients in connection with other matters pending in the DA's office.

(b) Volunteers who serve for more than 60 days in any 365 day period

Under G.L. c. 268A, §4, a special state employee to the DA who serves in that capacity for more than 60 days in any 365-day period is prohibited from privately representing a client in connection with any matter pending within the DA's office, irrespective of whether the employee has participated in or had responsibility for the matter as a volunteer lawyer. Under established Ethics Commission and Attorney General precedent, an attorney who serves the DA on any part of a day is considered to have served for a "day" in calculating the 60-day period under §4. EC-COI-80-31. Conversely, a day is not counted for the purposes of the 60-day limit unless services are actually performed, EC-COI-85-49. Because the application of §4 turns on the calculation of the 60-day period, volunteer attorneys must keep accurate records of their daily services for the DA.

3. Limitations on official activities of volunteer attorneys

Volunteer attorneys are also subject to certain limitations on their official activities. Under G.L. c. 268A §6, a volunteer attorney must abstain from participating for the DA in any matter in which the attorney's law firm has a financial interest. The abstention requirements will apply to participation in any matter in which the attorney's firm appears. EC-COI-89-5. To avoid any potential §6 difficulties, the DA should ascertain, prior to assignment, whether the pending matter is one which would have a financial effect on the volunteer attorney's firm. Following receipt of information disclosing a financial interest under §6(3), the official in the DA's office responsible for hiring volunteer attorneys may exercise several options, one of which would be to grant

written permission to the attorney to participate following a written determination under the standards of §6(3). Further, should a volunteer attorney be assigned a matter which, by virtue of the attorney's prior relationship with the parties, creates an appearance that the attorney will unduly favor one side, the attorney should disclose this relationship to the DA. G.L. c. 268A, §23(b)(3). Volunteer attorneys must also observe the safeguards of G.L. c. 268A, §23(c) and refrain from disclosing any confidential information which they have acquired as volunteers for the DA.

4. Limitations on partners of volunteer attorneys

The partners of a volunteer attorney are also subject to certain limitations on their private practice. Under G.L. c. 268A, §5(d), a partner of a state employee is prohibited from representing a private client in connection with the same particular matter in which the volunteer attorney participates in or has official responsibility for as a volunteer attorney. For example, if a volunteer attorney is assigned to handle a criminal appeal for the DA, the partners of the attorney may not represent the defendant in connection with the same case. Aside from those matters in which a volunteer attorney participates or has official responsibility for at the DA's office, a partner may represent clients in other matters before the DA.

5. Post-employment restrictions on volunteer attorneys

Upon the completion of services for the DA, a volunteer attorney will be considered a former state employee and will be subject to three restrictions under G.L. c. 268A.

G.L. c. 268A, §5(a) and (c), permanently prohibit a former volunteer attorney, and for one year the attorney's partners, from representing non-Commonwealth clients in connection with the same matters in which the attorney previously participated as a volunteer attorney. For example, if a volunteer attorney wrote a brief to the appeals court concerning a prosecution, the attorney is permanently prohibited from representing a private client in connection with the appeal of that prosecution to the State Supreme Judicial Court or the Federal Courts. The attorney's partners will share this restriction for a one year period following the completion of services by a volunteer attorney.

G.L. c. 268A, §5(e) establishes a one-year bar on a former volunteer attorney acting as a legislative agent^{3/} on behalf of a private client before the DA. The restriction on acting as legislative agent includes activities to persuade officials in the DA's office to take specific legislative action through either direct communication to those officials or by the solicitation of others to engage in such efforts. In the Matter of Cornelius Foley, 1984 SEC 1982. In addition, the G.L. c. 268A, §23(c) prohibition on disclosing confidential information continues to apply to former volunteers.^{4/}

6. Additional Limitations

Aside from the substantive restrictions of G.L. c. 268A discussed above, the DA's

office is authorized by G.L. c. 268A §23(e) to establish additional standards of conduct on volunteer attorneys. These standards, which would be enforced by the DA, rather than the Commission, could address these potential conflict issues which G.L. c. 268A does not fully address, such as establishing procedures to protect against unwarranted access to unrelated prosecution files.^{5/}

DATE AUTHORIZED: November 14, 1990

¹ "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. (G.L. c. 268A, §(k)).

² "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. (G.L. c. 268A, §10).

³ "Legislative agent" means any person who for compensation or reward does any act to promote, oppose or influence legislation, or to promote, oppose or influence the governor's approval or veto thereof or to influence the decision of any member of the executive branch where such decision concerns legislation or the adoption, defeat, or postponement of a standard, rate, rule of regulation pursuant thereto. The term shall include persons who, as any part of their regular and usual employment and not simply incidental thereof, attempt to promote, oppose or influence legislation or the governor's approval or veto thereof, whether or not any compensation in addition to the salary for such employment is received for such services. G.L. c. 268B, §(k).

⁴ A potential supplementary restriction concerning matters under the volunteer's official responsibility, contained in §5(b), is not relevant because any matter within the volunteer's official responsibility would also be a matter in which the volunteer participated for §5(a) purposes.

⁵ This opinion is limited to the application of G.L. c. 268A and does not purport to address other bodies of law such as G.L. c. 12, §16 or the Code of Professional Responsibility. You should therefore ascertain the application of the Code from other sources.